SNOW, CHRISTENSEN & MARTINEAU P.C.

SALT LAKE CITY • ST. GEORGE



January 23, 2013

**Contact Writer At:**
**801-322-9138**

**HAND-DELIVERED**

Kent L. Jones, P.E.
Utah State Engineer
Utah Division of Water Rights
1594 West North Temple, #220
Salt Lake City, Utah 84116-3156



RE: Salt Lake City Request for Reconsideration
Utah State Engineer Order dated January 3, 2013
Water Right Numbers: 57-7800 and 57-9001
Change Application Number: a28548
Applicant: Kevin Tolton

Please place copies of this Request for Reconsideration in the following related files:

Water Right Number: 57-10315 (Change Application Number: a28537)
Water Right Number: 57-10316 (Change Application Number: a28541)
Water Right Number: 57-10317 (Change Application Number: a28545)
Water Right Number: 57-10318 (Change Application Number: a28546)
Water Right Number: 57-10319 (Change Application Number: a28547)

Dear Mr. Jones:

This office represents Salt Lake City Corporation, Department of Public Utilities, 1530 South West Temple, Salt Lake City, Utah, 84115 (SLC) in this matter. We recognize that this has been a contentious and complicated process for the State Engineer and his staff. We appreciate the time and effort dedicated to it. That said, SLC respectfully requests that you reconsider your January 3, 2013 order described above (Order) for the following reasons:

1. **The manner in which the Order deals with the 1934 Contract is contrary to law, and unfair.**

With regard to SLC's right to the winter portion of the water right in question, the Order states as follows:

> The State Engineer is not a party to the contract and has no authority to interpret contracts between other parties. . . .

(Order at p. 7.)

By definition, the Order misapplies the principle of law that the State Engineer may not "adjudicate." Black's Law Dictionary defines "adjudication" as "[t]he legal process of resolving a **dispute** . . . . " (Emphasis added.) SLC's ownership of most of the winter water under the mother right, as described in the 1934 Contract, has been adjudicated in a way that is binding upon the parties and the State Engineer. There simply is no dispute to adjudicate. The language of the 1934 Contract is plain, and there is no need to "interpret" the contract.

In 2005, SLC and Sandy City jointly sought to adjudicate, among other things, SLC's interest under the terms of the 1934 Contract, by filing a Joint Petition for Interlocutory Decree under section 24 of the General Adjudication statute. SLC also sought to be a party to the *Haik v. Sandy City* quiet title matter via consolidation. The State Engineer opposed both efforts to get resolution. In part, the State Engineer's opposition to SLC's efforts to adjudicate the 1934 Contract was the State Engineer's stipulation that there was no dispute to adjudicate:

> In 1934, Salt Lake City and the owners of land served by the South Despain Ditch apparently entered into an agreement that allowed Salt Lake City to deliver water to the South Despain Ditch users through a pipeline during the non-irrigation season. Salt Lake City filed an application to appropriate the water conserved by running the water through the pipeline rather than the ditch. It does not appear that Salt Lake City's claim to that water right is disputed. There also appears to be no dispute regarding Salt Lake City's obligations under the 1934 Agreement.

State Engineer's Memorandum of Points and Authorities in Support of Motion to Dismiss Petition for Interlocutory Decree, p. 3, attached as Exhibit "A."

Indeed, the six applicants did not dispute SLC's claims regarding the 1934 Contract as described in the Joint Petition. In their Memorandum in Opposition to Consolidation, attached as Exhibit "B," the applicants stipulated to SLC's claims:

> In the Quiet Title Lawsuit, Respondents specifically acknowledged an interest held by Salt Lake City and do not contest Salt Lake City's rights.

The Joint Petition was dismissed in large part based upon this stipulation of the parties. The stipulation is an adjudication, binding on the parties, including the State Engineer:

> "A stipulation is an admission which may not be disregarded or set aside at will." Generally, stipulations are binding on the parties and the court. Thus, a stipulation entered into by the parties and accepted by the court "acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation." A party who stipulates to a court's actions "may not ... complain about them on appeal." Indeed, we have held that when parties, "instead of assembling witnesses and putting on their proofs, reduce their respective rights and priorities to writing and stipulate that a decree may be entered in conformity thereto, such contract if lawful has .... all the binding effect of findings of fact and conclusions of law made by the court." Further, while "[a] court may modify its findings, ... it cannot change or modify a contract of the parties."
>
> Thus, when a court adopts a stipulation of the parties, the issues to which the parties have stipulated become "settled" and "not reserved for future consideration."

*Prinsburg State Bank v. Abundo*, 2012 UT 94, ¶¶ 13-14, -- P.3d -- (footnotes omitted).

Such a stipulation would be binding upon the State Engineer even if the State Engineer was not a party:

> By a court of competent jurisdiction, that question in the prior proceeding as alleged and admitted was determined in favor of the plaintiffs and against the defendant Johnson. That judgment being final and unappealed from was not only binding on the parties, but also on the state engineer. He had no authority to disregard it. On the contrary, he was, as were the parties thereto, bound to respect it, and, when a certified copy of the findings and of the decree was served upon him, it was his duty to rule and act accordingly.

*Nye v. Bacon*, 18 P.2d 289, 291 (Utah 1933).

Even before the recent *Prinsburg* decision, Utah Courts had long held that parties who make statements in pleadings, seeking relief, are estopped from denying those statements when such relief is granted:

> Under judicial estoppel, a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.

*Café Rio, Inc. v. Larkin-Gifford-Overton, Inc.*, 2009 UT 27, ¶ 42, 207 P.3d 1235, 1243 (*quoting Nebeker v. State Tax Comm'n,* 2001 UT 74, ¶ 26, 34 P.3d 180). While the drafters of the Order might have not been aware of these court filings, the fact remains the State Engineer is just such an estopped party.

The applicants claim to be the successors to Lynn Christensen Biddulph, who in turn claim to be the successor to Saunders & Sweeney, Inc., in part through several intervening owners. The State Engineer's file on Water Right Number 57-7800 contains a letter dated December 18, 1998 from Biddulph's lawyer, John W. Anderson, outlining Biddulph's claim to a portion of the South Despain Ditch right. Mr. Anderson quite correctly concedes that the winter portion of the South Despain Ditch right was transferred to Salt Lake City by the terms of a 1934 Agreement, excepting only a reservation of 7,500 gallons per day (gpd) to be delivered from the 6 inch diameter pipe off the Murray Penstock. A copy of the referenced 1934 Agreement is attached to John W. Anderson's December 18, 1998 letter in the State Engineer's file on Water Right Number 57-7800. That letter was the basis for the State Engineer's staff updating the data base to reflect Biddulph as owner of the right. How this letter serves as the understanding of the State Engineer's office as to the applicants' interests, but not SLC's is not clear.

Either the State Engineer's office did not apply the "no State Engineer adjudications" principle even-handedly, or it did not make the findings necessary to approval. The first possibility is that the State Engineer's office found a dispute where there is none. That "dispute" was whether SLC, or, in the alternative, the applicants, are entitled to the use of winter water under the mother right. The State Engineer's office then effectively decided such "dispute" in favor of the applicants. The non-existent applicant claim and the SLC claim are simply opposite sides of the "dispute." No part of either side of this "dispute" may be determined without necessarily making a determination about the other.

The second possibility is that the State Engineer's office did not put the applicant to his burden of proof. In order to approve the change application in question the applicant had the burden of showing there is reason to believe the applicant was a person entitled to the use of winter water. The applicant had the burden to show there is reason to believe the applicant could put the water to the proposed year-round use without enlargement of his water right. *E.g., Searle*

*v. Milburn Irr. Co.*, 2006 UT 16, ¶ 31, 133 P.3d 382, 390. It was not, is not, SLC's burden to disprove these propositions.

In any event, the Order reflects an error regarding a SLC ROC on the South Despain decreed right. At page 7, the Order reads:

> Utah Code Section 73-1-10 directs that updating title with the State Engineer on a water right is accomplished by the filing of a Report of Water Right Conveyance (ROC). **The State Engineer has no such pending ROC at this time.** (Emphasis added.)

Further, at footnote 5, the Order reads:

> If a completed ROC is accepted by the State Engineer confirming an ownership interest that affects this right, the State Engineer in regard to this change application and underlying water right shall make the appropriate adjustments.

Again, the Order is in error on this point. The State Engineer's office has failed to recognize that SLC filed a ROC on the South Despain mother right (57-9001) on October 19, 2005 and it was accepted two days later on October 21, 2005. The State Engineer's database has long been updated to reflect this. *See* Database and ROC re: 57-9001.

The Order is further troubling for what appears to be an inconsistently applied, and poorly formulated, reaction to the recent *Jensen v. Jones* decision. What the State Engineer does—what the State Engineer has always done—is to reach an understanding of the applicable law, and apply it to the relevant facts as the State Engineer can determine them. *E.g.*, *East Bench Irr. Co. v. Tracy*, 300 P.2d 603, 607 (Utah 1956) ("The engineer's decision is based on his understanding of the law applicable to the facts as he views them."). The State Engineer should reach a view of the facts sufficient to make a decision, even when those facts are complicated or contested. This does not amount to "adjudication." As such, reaching an understanding of a relevant document, such as the 1934 Contract is not an "adjudication" or an impermissible "interpretation" simply because the contract has legal effect. *E.g.*, *Id.* ("His decision on such an application may be based on his views of very complicated questions of law and fact, but he does not adjudicate either the law or the facts in the case [...]. ").

The proper administrative law description for this process is "quasi-judicial." This process is not "judicial" or "adjudication," because it is done by an executive branch officer, not a court, and thus, none of the State Engineer's understanding of the law or his understanding of

the facts, or his application of the law as he understands it to the facts as he understands them, is binding on the parties. The parties may seek *de novo* review. Nothing the State Engineer does or says is binding on anyone in any context other than the approval or denial of a particular application. *See, e.g., Daniels Irr. Co. v. Daniel Summit Co.,* 571 P.2d 1323, 1325 (Utah 1977).

We urge the State Engineer's office to view the *Jensen v. Jones* decision in the narrow context of longstanding court abhorrence of forfeiture. We believe *Jensen* is a case where the State Engineer simply applied the law as he understood it to the relevant facts as he was able to determine them. The result was not binding on the parties. The result, however, was apparently viewed by the Court as unusually harsh. It is impossible to read the *Jensen* decision broadly and still rationalize that decision with the basic quasi-judicial job the State Engineer must do day to day.

There are, of course, steps the State Engineer should take to avoid impermissible "adjudication." We submit that new State Engineer-created criteria for protest consideration not found in applicable statute, and new State Engineer-created exemptions for the applicant's burden of proof not found in applicable statutes, are inappropriate.

Also, the State Engineer's office has seemingly determined that prior decisions made by the State Engineer's office are beyond review by the State Engineer or anyone else. This, we submit, is treating such decisions as "adjudicated" facts. It is effectively applying the notion of *res judicata.* As discussed in SLC's protest at point 1.B., the State Engineer's staff updated its records to reflect that the water right in question belonged to Dr. Tolton's predecessor, Ms. Biddulph, based upon a theory of appurtenance that was patently contrary to the law as the State Engineer staff understood it then, and understands it now. The State Engineer's office has refused to engage on this clear error, apparently only because "the matter has been decided."

**2. None of the 6 applicants have sufficient right to water, winter or summer, as a matter of law.**

Each of the 6 applicants trace their claim of title through a deed from Dr. Tolton as grantor to Dr. Tolton and the other 5 applicants as grantees of equal 1/6th interests, as tenants in common. Each of the applicants claims to be a successor to George and Prudence Despain who signed the 1934 Contract. George and Prudence Despain were one of 5 signing Despain parties. Assuming each of the signatory parties equally shared the reserved 7500 gpd of winter water, and limiting them to historic depletion as was done in the Order, then each of these 6 applicants

can be approved for only 50 gpd of diversion in the winter.[1] And this only if the State Engineer's office could ignore the express term of the 1934 Contract that SLC's obligation is to deliver water at the mouth of the canyon.

Ignoring the 1934 Contract for a moment for argument sake, still none of the applicants has a right to historic depletion sufficient to allow approval. See calculation at Exhibit "C." It is our understanding that the State Engineer's practice is to not approve a change for a particular use based upon rights which are less than the amount typical to such use.

One hallmark right of tenants in common is that each has the right to use of the entire property, and not just the use of a fraction. This can be changed only by partition via agreement or judicial decree. In either case this requires a deed or its equivalent. The analog for water rights, of course, is a segregation application.

Obviously, it is not uncommon for rights under a change application to be limited by historic depletions, as is the case here. Historic depletion can be a very important characteristic of a water right. It appears that with respect to this right someone in the State Engineer's office purported to allocate historic uses and depletion in a completely arbitrary manner. They purported to allocate all of the 15 elus to Kevin Tolton. This before there was a segregation application statute. We believe this allocation was without authority and without effect. Obviously, the State Engineer's office has no authority to change title. If the historic uses are indeed allocated equally, as it must be given the deed in question, none of the applicants have sufficient historic depletion for approval. See calculation at Exhibit "C."

**3. The Order announces new common law principles that are in error.**

**A. The Order erroneously announces a new common law principle that the subjective intent of the protestant is relevant to the State Engineer's decision.**

Page 3 of the Order contains the following:

[1] 7,500 gpd of winter water ÷ 5 signators to the 1934 Contract = 1,500 gpd of winter water in George Despain ÷ 6 applicants claiming through George Despain = 250 gpd of winter water diversion in each applicant x .20 depletion factor = **50 gpd in each applicant.**

> If the protestants believe as a matter of public policy it would be best to restrict further development in Little Cottonwood Canyon, they should work through other appropriate governmental entities to achieve that goal.

Nearly always a protestant seeks a change application denial in whole or in part. Nearly always such denial will result in a halt, alteration, or delay in whole or in part of a proposed new use of water. Nearly always the proposed new use of water involves a proposed new land use that is more or less dependent upon the change application approval. The two, a proposed new water use and a dependent proposed new land use, are nearly always linked. That is nearly always the point of a change application, a proposed new water use that facilitates the end goal of the applicant, a proposed new land use. Simple observation would suggest that more often than not that proposed new land use involves one or more single family residences.

The Order announces a new common law criterion for State Engineer consideration of protests. The State Engineer's office will now consider a protest differently depending upon whether the State Engineer's office determines the protestant is subjectively focused on the new proposed use of water and water rights only, or in the alternative, the protestant is in addition focused on the new proposed land use. The State Engineer's office has apparently adjudged that any fraction of the latter is inappropriate, and apparently disqualifies the protest to some undisclosed degree.

SLC Public Utilities Department has been tasked via city ordinance, state statute, and state constitution to protect the water rights of the city. Those rights involve not just a right to insist on no impairment of water quantity, but also a right to insist on no impairment of water quality, and no impairment of timing of water availability. *De minimus* impairments are not acceptable as a matter of law.

As the Utah Supreme Court stated in *Salt Lake City v. Silverfork Pipeline Co.*:

> We have consistently held that an appropriator of water rights also owns a vested interest in the source of that water, and no one may interfere with the source of the appropriator's water supply in a way that diminishes the quantity or quality of the appropriated water. This principle holds true regardless of how far the source may be from the place of use, and regardless of whether the source waters flow on the surface or underground.

2000 UT 3, n.6; 5 P.3d 1206, 1213 (citations omitted). Similarly, the Court wrote in *Piute Reservoir & Irr. Co. v. West Panquitch Irr. & Reservoir Co.*:

> [W]e did not approve the statement in the Engineer's decision that there could be a 'de minimus' decrease of the water reaching the lower users 'with which the courts will not be concerned.' In other words, while we approved the application, we definitely held that the change should not be allowed to operate without affirmative proof that the rights of the lower water users of the Sevier River were not thereby impaired.
>
> Does the evidence show reason to believe that the winter waters now used for culinary, stock watering and land flooding can be stored in a reservoir to be built until the dry summer season, then used to supplement watering of the presently irrigated land without depriving lower water users of the Sevier River of the use of some quantity of water **during the same period of time as would have been available to them without the change?** Without such a showing this application should be denied.
>
> [...]
>
> This court has never adopted the so-called *'de minimus'* theory. . . . If a *'de minimus'* reduction of the waters available to the lower water users were allowed under such conditions over and over again, the damage to the lower users would be unbearable.

367 P.2d 855, 856-858 (1962)(emphasis added).

Small impairments accumulate and SLC must take the long view in meeting its public water supply obligations. Water is, of course, the equivalent of the life blood of the city, and the residents and businesses in and near the city that depend upon the city for water. SLC cannot accept the equivalent of slow death by a thousand cuts without challenge.

Approximately 20% of the land in Little Cottonwood Canyon is private. There simply is not adequate year-round Little Cottonwood Creek water rights in private hands, nor sufficient clean sources, to allow for all the desires of all private landowners in the canyon. The areas near the top of the canyon are particularly the focus of development. This area in addition to being environmentally sensitive, and sensitive in terms of a major industry, skiing, also has limited year-round appropriate sources. It would seem obvious that here, high in the watershed, with prevalence of shallow and non-existent soils, consolidated tertiary bedrock, mostly steep slopes,

dry conditions in summer, and frozen conditions in winter, it all adds up to limited recharge. Mineralization provides water quality challenges as well.

Because of the presence of sensitive and unique wetlands, and stream environment, and the prevalence of federal lands that must be crossed for access, this area presents more than a little challenge in meeting environmental regulations, federal, state and local. These issues were raised in SLC's protest and September 1, 2011 supplement and at hearing, yet were barely addressed as part of the Order.

Because of the elevation and grades, limited and unpaved roads, prevalence of public lands, very limited government services, this area posses serious challenges to would-be developers in terms of just meeting basic public health and safety code requirements for fire truck and paramedic access, just to name one of many serious public health concerns as an example. This issue was raised in SLC's September 1, 2011 supplement and at hearing, yet was barely addressed as part of the Order.

### B. The Order announces new common law exemptions from the normal requirements for change application approval.

Page 5 of the Order offers the following summary of Utah Code Ann. § 73-3-3(7):

> The State Engineer may not reject a change application for the sole reason that it would impair a vested water right. But, if the application is otherwise proper he may approve it for part of the water involved or with conditions intended to provide compensation for conflicting rights. (Emphasis added.)

The underlined portion is not in the statute. The statute actually says the following:

> (7)(a) Except as provided by Section 73-3-30, the state engineer may not reject a permanent or temporary change application for the sole reason that the change would impair a vested water right.
> (b) If otherwise proper, the state engineer may approve a permanent or temporary change application for part of the water involved or upon the condition that the applicant acquire the conflicting water right. (Emphasis added.)

The express mention of the two actions the State Engineer may take in the face of interference implies the exclusion of all other actions the State Engineer may take in the face of interference.

This is a particularly good cannon of interpretation to apply where a primary function of the State Engineer's is to "be responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters." Utah Code Ann. § 73-2-1(3). The State Engineer is not tasked with ducking the job of proper distribution of water.

It is also a particularly good cannon of construction to apply where the Utah Supreme Court has repeatedly said an applicant must show reason to believe the proposed use will not impair existing rights in order to obtain change application approval. *E.g., Searle v. Milburn Irr. Co.*, 2006 UT 16, ¶ 31, 133 P.3d 382, 390.

If the State Engineer could reject most applications when the applicant cannot make the necessary showing of reason to believe there will be no impairment, but, then change course, without any standards, and tell select applicants essentially, "seems there will be impairment, but I'll approve the application anyway, you guys go fight about compensation," the legal protections afforded one water user's rights could be capriciously denied to another water user. Consistency in water rights administration is critical, lest the process be corrupted by subjective or political favoritism.

The applicant does not have what would essentially be an eminent domain power to impair water rights and force the owners of the impaired rights to accept only monetary compensation as a remedy. The Order's suggestion that there is such a power in the applicant has very serious ramifications for SLC. The Utah Supreme Court has long recognized that where interference with water rights is concerned, injunction is the appropriate remedy. *See, e.g., Hunsaker v. Kersh*, 1999 UT 106, ¶ 10, 991 P.2d 67; *North v. Marsh*, 504 P.2d 1378, 1380 (Utah 1973); *Gianulakis v. Sharp*, 267 P. 1017, 1019 (1928). The Utah Code confirms this. Utah Code Ann. §§ 73-1-14; -1-15; -2-1(6)(a); -2-25(2), -29-205. As does the fact that interference with water rights is a crime. *See id.* § 73-3-14; *see also* § 76-10-201. The State Engineer's office should be enforcing these statutes, e.g., § 73-2-1(6), and not encouraging interference.

The Order should be revised to precondition any diversions under the approved application upon the applicant making a showing to the State Engineer's office that he has either successfully adjudicated that SLC does not have the right to winter water, or in the alternative, the applicant has "acquir[ed] the conflicting water right" as the statue directs. As to other likely impaired water rights, like power rights, the Order should be specific about which water rights are referred to. The Order should not simply put the applicant on the honor system to determine interference.

The Order announces a new common law exemption from the applicant's burden to show reason to believe the proposed use is feasible:

> The State Engineer routinely approves applications presuming other necessary permits can be subsequently secured. . . .
>
> On small applications proposing the domestic use of one family, the State Engineer typically does not ask for a specific statement or documentation of applicant's financial ability to complete the proposed works.

(Order at p. 7.)

This new State Engineer-created exemption from the statutory requirement of proof of feasibility apparently involves presumptions that are irrebuttable, as the protestants here pointed out some very major health and safety code requirements which make the proposed use infeasible. The applicant never even attempted to meet his burden of showing there is reason to believe the proposed use is feasible in the face of these requirements.

The Order provides the true rule of law State Engineer must apply in the very next paragraph:

> Each change application submitted to the State Engineer is to be evaluated based on its own merits.

The proposed home is at approximately 9,500 foot elevation, in heavily used ski area, surrounded by public lands, in a very sensitive environment. It is nowhere near a typical home. Each change application is to be evaluated based on its own merits, and not based upon some State Engineer-announced special exemption or irrebuttable presumption for a broad and general category like "single homes."

When the Utah Legislature intended particular applicants be exempt from showing feasibility it knew how to say it. In Utah Code Ann. § 73-3-8(1)(a)(iii) the Legislature exempted the U.S. Bureau of Reclamation. The express mention of who is exempt from a feasibility showing, by implication excludes all other exemptions not mentioned. "[D]evelopment of water must require strict adherence to statutory sanctions, without delay or non-conformance thereto." *Western Water, LLC v. Olds*, 2008 UT 18 ¶ 28, 184 P.3d 578, 587 (quoting *Baugh v. Criddle,* 19 Utah 2d 361, 431 P.2d 790, 791–92 (1967)).

4. **The State Engineer office's view that the applicant can avoid local interference by drilling a well into bedrock is hydrologically flawed.**

The other sources being used in the area are springs and mine tunnels, that is to say, bedrock sources. In order for the applicant to find water in bedrock he obviously must tap into water that has infiltrated into cracks in the bedrock from the surface, and a fair volume of cracks at that. If the approved well must tap into cracks that communicate with the surface and hold enough water they most likely also communicate with systems that feed the other sources in the area. The recharge for the existing sources and the approved well are likely a relatively interconnected complex of cracks and fissures. Empiric data supports this. For example, the approved well is within the 250 day recharge area of sources for Salt Lake Service Area Number 3. As the service area's protection plan points out, this is based upon a considerable amount of data about geology made available because of the extensive historic mining in the area. While these issues were raised at length in SLC's September 1, 2011 supplement to the record and SLCSA3's Keith Hansen's testimony, they were not adequately addressed in the Order.

Certainly, there is nothing that would lead one to conclude there is reason to believe the applicant is not likely to tap into cracks and fissures that are interconnected with other sources. The Order simply does not comport with good hydrology.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

Shawn E. Draney
Scott H. Martin

Cc: Client
Protestants

A

NORMAN K. JOHNSON, No. 3816
L. WARD WAGSTAFF, No. 5554
Assistant Attorneys General
MARK L. SHURTLEFF, No. 4666
UTAH ATTORNEY GENERAL
Attorneys for the State Engineer
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116
Telephone: (801) 538-7227

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE UTAH LAKE AND JORDAN RIVER IN UTAH, SALT LAKE, DAVIS, SUMMIT, WASATCH, SANPETE, AND JUAB COUNTIES IN UTAH

LITTLE COTTONWOOD CREEK, AREA 57

SALT LAKE CITY CORPORATION and SANDY CITY,

Petitioners,

vs.

KEVIN TOLTON, M.D., MARK C. HAIK, JUDITH MAACK, WILLIAM S. HOGE, BUTLER MANAGEMENT GROUP, and MARVIN A. MELVILLE, individually and as Trustee of the MARVIN A MELVILLE TRUST, a Utah trust,

Respondents.

**STATE ENGINEER'S MOTION TO DISMISS JOINT PETITION FOR INTERLOCUTORY DECREE**

Civil No. 360057298
(57-General)

Judge Timothy R. Hanson

C/clients 7/20/05

Jerry D. Olds, Utah State Engineer, by and through counsel, hereby moves the Court to dismiss the Joint Petition for Interlocutory Decree, filed by Salt Lake City Corporation and Sandy City (Petitioners). This Court has authority to dismiss or deny the Joint Petition based on *Mitchell v. Spanish Fork West Field Irrigation Co.*, 265 P.2d 1016 (Utah 1954). The Court should dismiss the Joint Petition because Petitioners have not cited circumstances to justify hearing the quiet title action in the general adjudication. The grounds for the Motion to Dismiss are more fully explained in the State Engineer's Memorandum of Points and Authorities in Support of Motion to Dismiss Joint Petition for Interlocutory Decree.

Dated this 19th day of July, 2005.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

L. Ward Wagstaff

L. WARD WAGSTAFF
Assistant Attorney General
Attorneys for the Utah State Engineer

NORMAN K. JOHNSON, No. 3816
L. WARD WAGSTAFF, No. 5554
Assistant Attorneys General
MARK L. SHURTLEFF, No. 4666
UTAH ATTORNEY GENERAL
Attorneys for the State Engineer
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116
Telephone: (801) 538-7227

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Respondents.

**STATE ENGINEER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS JOINT PETITION FOR INTERLOCUTORY DECREE**

Civil No. 360057298
(57-General)

Judge Timothy R. Hanson

Jerry D. Olds, Utah State Engineer, by and through counsel, submits this State Engineer's Memorandum of Points and Authorities in Support of Motion to Dismiss Joint Petition for Interlocutory Decree.

## INTRODUCTION

On June 3, 2005, Salt Lake City Corporation and Sandy City (collectively "Petitioners") filed a Joint Petition for Interlocutory Decree. The Petitioners seek a quiet title action, pursuant to section 73-4-24 of the Utah Code, within the Utah Lake and Jordan River general adjudication. Kevin Tolton, Mark C. Haik, Judith Maack, William S. Hoge, Butler Management Group, and Marvin A. Melville, individually and as trustee of the Marvin A. Melville Trust, (collectively "Tolton Water Users") are the Respondents.

The Tolton Water Users claim certain water rights on the South Despain Ditch, which diverts water from Little Cottonwood Creek at the mouth of Little Cottonwood Canyon. The South Despain Ditch and Little cottonwood Creek are within the area of the Utah Lake and Jordan River general adjudication of water rights. The State Engineer has not published a proposed determination of water rights for the Little Cottonwood Creek drainage.

The water rights for the South Despain Ditch were awarded by the Third Judicial District Court in the case *Union and East Jordan Irrigation Co. v. Richards Irrigation Co.* Case No. 4802, Salt Lake County, June 16, 1910 (Little Cottonwood Morse Decree). Historically, the water diverted through the South Despain Ditch was used primarily for irrigation.

In December 2003, the Tolton Water Users filed change applications with the State Engineer. The Tolton Water Users seek to change the point of diversion and the place, nature, and period of use so the water

can be used in homes in the Albion Basin at the top of Little Cottonwood Canyon. Salt Lake City and Sandy City both protested the change applications. In addition, Sandy City has asserted a claim of ownership of part of the water rights upon which the Tolton Water Users based the change applications. The ownership dispute between Sandy City and the Tolton Water Users must be resolved before the State Engineer can act on the change applications.

In 1934, Salt Lake City and the owners of land served by the South Despain Ditch apparently entered into an agreement that allowed Salt Lake City to deliver water to the South Despain Ditch users through a pipeline during the non-irrigation season. Salt Lake City filed an application to appropriate the water conserved by running the water through the pipeline rather than the ditch. It does not appear that Salt Lake City's claim to that water right is disputed. There also appears to be no dispute regarding Salt Lake City's obligations under the 1934 agreement.

On about April 5, 2005, the Tolton Water Users served their Notice of Claims notifying Sandy City of their intent to file a lawsuit to quiet title to the disputed water rights. On June 3, 2005, the Petitioners filed the Joint Petition. The Tolton Water Users have filed a private action to quiet title to the water rights.

## ARGUMENT

### I THIS COURT HAS DISCRETION TO DISMISS OR DENY THE JOINT PETITION

The Joint Petition was filed pursuant to section 73-4-24 of the Utah Code, which states:

> If, during the pendency of a general adjudication suit, there shall be a dispute involving the water rights of less than all of the parties to such suit, any interested party may petition the district court in which the general adjudication suit is pending to hear and determine said dispute. All persons who have a direct interest in said dispute shall be given such notice as is required by order of the district court and in addition thereto the district court shall require that notice of the initial hearing on said dispute be given by publication at least once each week

> for two successive weeks in newspapers reasonably calculated to give notice to all water users on the system. Thereafter the court may hear and determine the dispute and may enter an interlocutory decree to control the rights of the parties, unless modified or reversed on appeal, until the final decree in the general adjudication suit is entered. At that time the district court may after hearing make such modifications in the interlocutory decree as are necessary to fit it into the final decree without conflict.

Utah Code Ann. § 73-4-24 (West 2004).

The Utah Supreme Court has defined and limited the scope of section -24. After publication of the proposed determination, a party may not pursue a section -24 action unless it is based on a timely, valid objection to the proposed determination. *Jensen v. Morgan*, 844 P.2d 287, 291 (Utah 1992). The trial court should not grant a section -24 petition if the court can provide a reasonably prompt resolution of the objection by holding a hearing in the context of the general adjudication. *Murdock v. Springville Municipal Corp.*, 878 P.2d 1147, 1150 (Utah 1994). For practical purposes, a section -24 proceeding is an expedited version of the general adjudication. *See id.*

The State Engineer has not published a proposed determination for the Little Cottonwood Creek drainage, and there is no objection on which to base the Joint Petition. The Utah Supreme Court has held that a trial court has discretion to deny a section -24 proceeding before publication of the proposed determination. *See Mitchell v. Spanish Fork West Field Irrigation Co.*, 265 P.2d 1016, 1019 (Utah 1954) (private lawsuit to determine title to water rights should not be dismissed in favor of a section -24 proceeding). In *Mitchell*, a water user in Spanish Fork Canyon filed a private lawsuit claiming he had acquired water rights by adverse use against certain water users in Utah Valley. *Id.* at 1018. The other water users moved to dismiss, arguing that because the general adjudication was pending, Mitchell must pursue his claim under section 73-4-24. *Id.* The Utah Supreme Court held that the trial court did not abuse its discretion when it refused to dismiss the

private action because that would have required "the Utah County litigants to go up to Salt Lake County to have their rights adjudicated when the parties, property, and undoubtedly all of the witnesses would be from Utah County." *Id.* at 1019.

The Court addressed the relative merits of hearing a case in the general adjudication as opposed to a private action:

> In many instances it would complicate rather than simplify litigation to compel parties situated as are the litigants here to go into the general adjudication suit. As a matter of fact, in such general suits it is often necessary to conduct segmental litigation between parties to adjudicate their rights. It is true that the decree in the instant case would only be binding on the parties to this litigation and could not enlarge their rights against anyone else; it would necessarily be subject to the determination made in the general adjudication suit which would also be binding upon these litigants who are parties to it. There may be circumstances under which the possible effect of the general adjudication would so drastically change the water rights being litigated in a separate suit, that it would seem futile or unwise to permit it to continue. This is something which the trial court can consider in exercising its discretion as to whether the action should be carried forward or abated. Under the permissive wording of the statute, and consistent with its purpose of simplifying and expediting litigation, it was within the discretion of the trial court to refuse to grant defendants' motion to abate the present action.

*Id.* (footnote omitted). The Court thus acknowledged that the result of a private action would not be binding on all the parties to the general adjudication, including the State Engineer. But the Court recognized that this was not reason enough to require the case to be heard in the general adjudication. Only if there are "circumstances under which the possible effect of the general adjudication would so drastically change the water rights being litigated in a separate suit, that it would seem futile or unwise to permit it to continue," should the suit be heard in the general adjudication. *Id.*

In *Mitchell*, the Utah Supreme Court established that the trial court has discretion to deny a section -24 petition, and it also established that a section -24 petitioner has heavy burden to show that a dispute should

proceed under section -24. The Court considered the argument that the general adjudication would bind other parties, but held that argument does not justify a section -24 proceeding. *Id.* Rather, the circumstances, including the range of issues, must be such that the general adjudication would – not "could" – so drastically change the result that it would be "futile or unwise" to continue the private action. *Id.* A petitioner must show more than a "possibility" of inconsistent judgments – it must show that the private action would be pointless.

Petitioners do not justify the Joint Petition except to assert that first, the section -24 proceeding will prevent inconsistent judgments and second, it will provide notice to all water users on Little Cottonwood Creek. Joint Petition ¶ 7. Petitioner's concern about inconsistent judgments is unfounded. All cases, even general adjudications of water rights, are subject to the possibility that other lawsuits may affect or void the results of the original case. The State Engineer constantly deals with literally hundreds of judgments to which it was not a party and by which it is not technically bound. For example, the State Engineer was not a party to the Little Cottonwood Morse Decree. The Utah Supreme Court determined in *Mitchell* that the mere possibility of inconsistent judgments does not justify a section -24 proceeding unless "the general adjudication would so drastically change the water rights being litigated in a separate suit, that it would seem futile or unwise to permit it to continue." *Mitchell*, 265 P.2d at 1019.

With regard to notice to other water users, section -24 requires a petitioner to identify "[a]ll persons who have a direct interest in said dispute." Utah Code Ann. § 73-4-24. If the Petitioners are able to identify those parties for purposes of a section -24 proceeding, they are able to identify them for purposes of a private quiet title action. Utah statutes provide that parties who have an interest in a quiet title action are served notice in a manner substantially similar to a section -24 proceeding. *See id.* § 78-40-12 (in quiet title actions, service

of summons on unknown defendants by publication is effective to bind those defendants). Section -24 therefore offers no advantage over a private quiet title action unless a full adjudication of the water rights is necessary.

Salt Lake City is familiar with private quiet title actions to determine ownership of water rights. It successfully brought a private action, outside the general adjudication, against Silver Fork Pipeline Corporation to quiet title to certain water rights in Big Cottonwood Canyon. The litigation resulted in two Utah State Supreme Court decisions. *See Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731 (Utah 1993); *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, 5 P.3d 1206.

The Petitioners have not cited urgent or pervasive problems with the South Despain Ditch water rights that require an immediate comprehensive determination. There are no reasons to address any issues other than title, and title can be addressed more efficiently and expeditiously in a private action. This Court should therefore dismiss the Joint Petition and allow the private action to proceed.

## II THE TRIAL COURT SHOULD NOT OVERRIDE THE STATE ENGINEER'S DISCRETION TO ALLOCATE RESOURCES EXCEPT UNDER EXCEPTIONAL CIRCUMSTANCES

The State Engineer is a necessary party to all proceedings in a general adjudication. Utah Code Ann. § 73-4-18. One of the State Engineer's roles in a general adjudication is to safeguard the State's rights to unappropriated water and to see that water right claims are limited to beneficial use. *Huntsville Irrigation Ass'n v. District Court*, 270 P. 1090, 1093 (Utah 1928). The State Engineer, as representative of the people of the state of Utah, would always be affected, and would therefore be a necessary party to any section -24 proceeding. *See* Utah Code Ann. § 73-4-24 ("All persons who have a direct interest in said dispute shall

be given such notice as is required by order of the district court . . . .").

General adjudications of water rights are massive undertakings. The Utah Legislature has charged the State Engineer with conducting the general adjudications. *See, e.g.*, Utah Code Ann. § 73-4-3 (State Engineer to give notice of commencement of the general adjudication; prepare list of water right owners of record; survey and map the water sources and uses; send water users notice to file claims; prepare a report and recommendation to the court); *id.* § 73-4-4 (State Engineer to search records, file affidavit, and publish summons); *Id.* § 73-4-5 (State Engineer to furnish forms for statements of water users's claims); *id.* § 73-4-11 (State Engineer to prepare report and recommendation of water rights and to administer water rights in accordance with the report and recommendation). Because the State Engineer's resources do not match the size of the undertaking, the adjudication of a complete river basin may take decades. *See, e.g., Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 4, 982 P.2d 65 (Utah Lake and Jordan River general adjudication commenced in 1944 and is still pending). With the limited resources available, it is essential that the State Engineer's discretion in choosing where to allocate those resources be respected.

The general adjudication procedure in Utah consists of two stages: first an administrative stage, during which the State Engineer conducts the investigations and other activities as directed by the statute; second, a later stage before the Court. *Eden Irrigation Co. v. District Court*, 211 P. 957, 960 (Utah 1922). Section -24 essentially allows the trial court to become involved in the administrative stage by directing the State Engineer to address water right issues in a particular area. As the Utah Supreme Court pointed out in *Mitchell*, most disputes can be resolved in a private action rather than a section -24 proceeding. *Mitchell*, 265 P.2d at 1019. A trial court should be very reluctant to direct allocation of the State Engineer's resources

throughout the state by granting section -24 petitions, especially if the disputes can be resolved outside the general adjudication. The trial court in such a situation substitutes its judgment for that of the administrative agency regarding where the administrative activity should take place. That may be necessary or proper under certain circumstances, as the Court pointed out in *Mitchell*. *See id.* ("There may be circumstances under which the possible effect of the general adjudication would so drastically change the water rights being litigated in a separate suit, that it would seem futile or unwise to permit it to continue."). At the same time, that level of court involvement in the administrative process runs counter to the legislature's mandate to the State Engineer to conduct the administrative activities of the general adjudication. If it is necessary and urgent to conduct a general proceeding in an area, the district court has authority to redirect the State Engineer's efforts. But because the decision to allocate the State Engineer's resources is inherently within the State Engineer's discretion, such court direction in those decision should be a last resort.

The State Engineer's staff is currently conducting adjudication activities in the lower Bear River drainage. If the State Engineer must divert effort from that area in order to address water rights in the South Despain Ditch, it will necessarily take longer to complete the work in the lower Bear River drainage. The situation would become unmanageable if additional section -24 petitions are filed elsewhere in the state.

Nor does the State Engineer have a reasonable option to decline to participate. Although the initial issue is a simple quiet title dispute between the Tolton Water Users and Sandy City, the State Engineer's Office could find itself bound on other incidental issues if it does not participate, or it could find itself bound for failure to raise issues. If this Court grants the Joint Petition and allows the section -24 proceeding to go forward, all issues along the South Despain Ditch are apparently fair game, and the State Engineer and South

Despain Ditch water users run a major risk if they do not actively participate. Because of the uncertainty about which issues will eventually be addressed, the reasonable approach for the State Engineer – perhaps the only feasible approach – is to conduct a complete adjudication of the water rights on the South Despain Ditch and address all issues at once (assuming those issues can be confined to the South Despain Ditch area). Such a comprehensive approach would mean surveying all aspects of all the water rights, including historic use, and making a full recommendation to this Court, just as if the State Engineer were preparing a proposed determination. That process could resolve the dispute between Sandy City and the Tolton Water Users, but would complicate and delay resolution of the title question. *Cf. Mitchell*, 265 P.2d at 1019 ("In many instances it would complicate rather than simplify litigation to compel parties situated as are the litigants here to go into the general adjudication suit.")

Sandy City and the Tolton Water Users have a legitimate interest in resolving their title dispute, but they can accomplish that more readily and expeditiously in a private quiet title action. Aside from the title dispute, which can be decided outside the general adjudication, Salt Lake City has cited no urgency in determining these water rights as opposed to the tens of thousands of other water rights around Utah that await the State Engineer's attention. There is therefore no benefit to the section -24 proceeding, and it would be more efficient and expeditious to try the title dispute in a private action.

This Court should not require the section -24 proceeding without substantial justification. There is no justification in this case, and the Court should dismiss the Joint Petition.

## CONCLUSION

The Petitioners have cited no convincing reasons why this quiet title action should be heard as a section

-24 proceeding rather than as a private quiet title action. Using section -24 to resolve disputes that are routinely resolved in private actions requires the State Engineer to divert resources from other areas. This Court should not attempt to manage the affairs of the administrative agency unless there are compelling reasons to do so. There are no compelling circumstances and no urgency in this situation to justify such a drastic measure. The Court should dismiss the Joint Petition.

Dated this 19th day of July, 2005.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

L. Ward Wagstaff

L. WARD WAGSTAFF
Assistant Attorney General
Attorneys for the Utah State Engineer

## CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **State Engineer's Memorandum of Points and Authorities in Support**, first class postage prepaid, this 19th day of July, 2005, to the following:

Shawn E. Draney
Scott H. Martin
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Christopher E. Bramhall
Assistant City Attorney
Salt Lake City, Law Department
451 South State Street, Room 505
Salt Lake City, Utah 84111

John H. Mabey, Jr.
David C. Wright
Mabey & Wright
265 East 100 South, #300
Salt Lake City, Utah 84111

Bryce D. McEuen
Assistant City Attorney
Sandy City Corporation
10000 Centennial Parkway
Sandy, Utah 84070

Ronald G. Russell
Daniel A. Jensen
Matthew J. Ball
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

L. Ward Wagstaff

B

Ronald G. Russell, Esq. (4134)
Daniel A. Jensen, Esq. (5296)
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Respondents
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147-0019
Telephone: (801) 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

| | |
|---|---|
| IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE UTAH LAKE AND JORDAN RIVER IN UTAH, SALT LAKE, DAVIS, SUMMIT, WASATCH, SANPETE, AND JUAB COUNTIES IN UTAH<br><br>LITTLE COTTONWOOD CREEK, AREA 57 | MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CONSOLIDATE |
| SALT LAKE CITY CORPORATION; and SANDY CITY,<br><br>Petitioners,<br><br>vs.<br><br>KEVIN TOLTON, M.D.; MARK C. HAIK; JUDITH MAACK; WILLIAM S. HOGE; BUTLER MANAGEMENT GROUP; and MARVIN A. MELVILLE, individually and as Trustee of the MARVIN A MELVILLE TRUST, a Utah trust,<br><br>Respondents. | Civil No. 360057298CV<br>Judge Timothy R. Hanson |

Butler Management Group, Mark C. Haik, William S. Hoge, Judith Maack, Marvin A. Melville, individually and as trustee of the Marvin A. Melville Trust, and Kevin Tolton (hereinafter referred to collectively as "Respondents") respectfully submit the following memorandum of points and authorities in opposition to the motion to consolidate filed by Salt Lake City and Sandy City.

## I. INTRODUCTION

Respondents are the record title owners of a decreed right to divert and use water from Little Cottonwood Canyon, sometimes known as water right number 57-7800 (the "Water Right"). Respondents purchased the Water Right on October 24, 2003 and promptly recorded the deed with the Salt Lake County Recorder on October 28, 2003. Sandy City recently claimed to be the owner of the same Water Right by virtue of a quitclaim deed dated November 22, 1976, but not recorded until April 21, 2004. During the 28 years prior to such recording, Sandy City never asserted ownership of the Water Right and has taken various actions, including the filing of written documents, acknowledging no ownership of the Water Right and confirming instead ownership by Respondents' predecessors in title.

As a result of the ownership claim belatedly asserted by Sandy City, Respondents filed a complaint to quiet title against Sandy City's purported interest. That action is entitled Mark C. Haik, et al. v. Sandy City, Civil No. 050911311WR, and was assigned to Judge Sandra N. Peuler (the "Quiet Title Lawsuit"). The issues in the Quiet Title Lawsuit are solely between Respondents and Sandy City and concern only their competing claims to ownership of the Water

Right. In the Quiet Title Lawsuit, Respondents specifically acknowledge an interest held by Salt Lake City and do not contest Salt Lake City's rights.

In a transparent effort to delay the resolution of the simple title dispute between Respondents and Sandy City, Salt Lake City has teamed with Sandy City to file a joint petition for interlocutory decree (the "Joint Petition") within the Utah Lake and Jordan River general adjudication. That petition is entitled Salt Lake City Corporation, et al. v. Kevin Tolton, et al. and was filed with Civil No. 360057298CV (the "General Adjudication").

The Utah State Engineer has filed a motion to dismiss the Joint Petition in the General Adjudication. The state engineer's motion is well-taken and should be granted. Accordingly, the court should not grant a motion to consolidate the Quiet Title Lawsuit into a proceeding that will be dismissed.

## II. POINTS AND AUTHORITIES

### A. The State Engineer's Motion to Dismiss the Joint Petition Is Well-Taken and Should Be Granted.

The state engineer has moved this court to dismiss the Joint Petition, which dismissal is fully supported by Respondents. The arguments in support of the dismissal of the Joint Petition are stated in detail in the State Engineer's Memorandum of Points and Authorities in Support of Motion to Dismiss Joint Petition for Interlocutory Decree. Rather than recite those arguments, Respondents adopt them and urge the court to grant the motion to dismiss for the reasons stated in the state engineer's memorandum. Simply stated, a section-24 proceeding is not justified in this instance. The title dispute between Sandy City and Respondents can be accomplished more

readily and expeditiously in a private quiet title action. Salt Lake City and Sandy City should not be permitted to use the tactic of delaying the resolution of the private title dispute between Respondents and Sandy City by making it a part of the General Adjudication of all of the Utah Lake and Jordan River water rights.

B. The Quiet Title Action Should Not Be Consolidated Into a Proceeding That Will Be Dismissed.

Under Rule 42(a) of the Utah Rules of Civil Procedure, the court may consolidate actions involving a common question of law or fact. The first prerequisite for consolidation, however, is the existence of two pending actions. Upon the dismissal of the Joint Petition for the reasons submitted by the state engineer, only the Quiet Title Lawsuit will remain. Consequently, the motion for consolidation should be denied.

## III. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Joint Petition filed in the General Adjudication should be dismissed and the motion to consolidate denied.

DATED this 19th day of September, 2005.

PARR WADDOUPS BROWN GEE & LOVELESS

By: _____
Ronald G. Russell, Esq.
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2005 a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CONSOLIDATE was mailed, postage prepaid, to:

Shawn E. Draney, Esq.
Scott H. Martin, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
Salt Lake City, Utah 84111

John H. Mabey, Jr., Esq.
David C. Wright, Esq.
MABEY & WRIGHT
265 East 100 South, Suite 300
Salt Lake City, Utah 84111

Christopher E. Bramhall, Esq.
Assistant City Attorney
SALT LAKE CITY
451 South State Street, Room 505
Salt Lake City, Utah 84111

Bryce D. McEuen, Esq.
Assistant City Attorney
SANDY CITY CORPORATION
10000 Centennial Parkway
Sandy, Utah 84070

Norman K. Johnson, Esq.
L. Ward Wagstaff, Esq.
Assistant Attorneys General
Mark L. Shurtleff, Esq.
UTAH ATTORNEY GENERAL
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

Ronald G. Russell, Esq.

C

## SUMMARY OF STATE ENGINEER ASSIGNED HISTORIC USES, AND RESULTING DIVERSION AND DEPLETION MAXIMUMS

| Applicant | Historic Uses Apparently Allocated by State Engineer's Office per 12/29/03 Segregation History. | Annual Diversion Volume Per Apparently Allocated Historic Use | Total Apparently Allocated Diversion per Applicant | Annual Depletion Volume Per Apparently Allocated Historic Use | Total Apparently Allocated Depletion per Applicant |
|---|---|---|---|---|---|
| Dr. Kevin Tolton | Irrigation:<br><br>.01 ac. | .05 AF<br><br>(.01 acres x 5AF/ac. diversion = .05 AF) | | .021 AF<br><br>(.05 AF diversion x 42.4% depleted = .021 AF depletion) | |
| | Domestic:<br><br>1 | .45 AF | | .09 AF<br><br>(.45 AF diversion x 20% depleted = .09 depletion) | |
| | Stock water:<br><br>15 ELUs | .42 AF<br><br>(15 ELU x .028 AF/ELU = .42) | | .42 AF<br><br>(.42 AF diversion x 100% = .42 AF depletion) | |
| | | | .92 AF | | .531 AF |
| Judith Maak<br><br>Note: The allocation of historic uses and resulting | Irrigation:<br><br>.18 ac. | .9 AF<br><br>(.18 ac. x 5 AF/ac. = .9 AF) | | .381<br><br>(.9 AF diversion x 42.4% depletion = .381 AF depletion) | |

| | | | | | |
|---|---|---|---|---|---|
| numbers are exactly the same for Marvin Melville Trust and William Hoge | | | | | |
| | | | .9 AF | | .381 AF |
| Mark C. Haak<br><br>Note: The allocation of historic uses and resulting numbers are exactly the same for the Butler Management Group | Irrigation:<br><br>.09 ac. | .45 AF<br><br>(.09 ac. x 5 AF/ac. = .45 AF) | | .191 AF<br><br>(.45 AF diversion x 42.4% depletion = .191 AF depletion | |
| | Domestic:<br><br>1 | .45 AF | | .09 AF<br><br>(.45 AF diversion x 20% depleted = .09 depletion) | |
| | | | .90 AF | | .281 AF |